No. 93-644

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

HONDA MOTOR CO., LTD.; HONDA R&D CO., LTD.; and AMERICAN HONDA MOTOR CO., INC.,
Petitioners,

v.

KARL L. OBERG,
Respondent.

On Writ of Certiorari to the Supreme Court of Oregon

BRIEF OF AMICI CURIAE CBS INC.; CABLE NEWS NETWORK, INC.; CAPITAL CITIES/ABC, INC.; THE CHRONICLE PUBLISHING COMPANY; THE COPLEY PRESS, INC.; DOW JONES & COMPANY, INC.; PROVIDENCE JOURNAL COMPANY; REUTERS AMERICA INC.; TIME INC.; WESTINGHOUSE BROADCASTING COMPANY, INC.; ASSOCIATION OF AMERICAN PUBLISHERS; MAGAZINE PUBLISHERS OF AMERICA, INC.; NATIONAL ASSOCIATION OF BROADCASTERS; NEWSPAPER ASSOCIATION OF AMERICA; RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION; REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; AND SOCIETY OF PROFESSIONAL JOURNALISTS, IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST	2
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. COURTS HAVE A CONSTITUTIONAL DUTY TO INDEPENDENTLY REVIEW JUDGMENTS THAT THREATEN FIRST AMENDMENT FREEDOMS	4
II. THE AMOUNT OF DAMAGES AWARDED IN FIRST AMENDMENT CASES IS AN ISSUE OF CONSTITUTIONAL DIMENSION SUBJECT TO THE DUTY OF INDEPENDENT JUDICIAL REVIEW	7
III. LOWER FEDERAL COURTS AND OTHER STATE COURTS HAVE RECOGNIZED THE NEED FOR INDEPENDENT REVIEW OF DAMAGE AWARDS IN LIBEL CASES	10
IV. THE PROHIBITION OF PRESUMED AND PUNITIVE DAMAGES DOES NOT REMOVE THE NEED FOR INDEPENDENT JUDICIAL REVIEW OF LIBEL DAMAGE AWARDS	14
CONCLUSION	18

TABLE OF AUTHORITIES

CASES — Page

A.H. Belo Corp. v. Rayzor, 644 S.W.2d 71 (Tex. App. 1982) 12
Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984) 3, 7, 10
Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) 9, 10
Edwards v. South Carolina, 372 U.S. 229 (1963) 5
The Florida Star v. B.J.F., 491 U.S. 524 (1989) 2
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 3, 4, 7, 8, 14, 15, 16
Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6 (1970) 3, 5
Kidder v. Anderson, 345 So.2d 922 (La. App. 1977), *rev'd*, 354 So.2d 1306 (La.), *cert. denied*, 439 U.S. 829 (1978) 12
Lerman v. Flynt Distrib. Co., 745 F.2d 123 (2d Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985) 12, 13, 16
Nevada Indep. Broadcasting Corp. v. Allen, 99 Nev. 404, 664 P.2d 337 (1983) 11, 17, 18
New York Times Co. v. Sullivan, 376 U.S. 254 (1964) ..... *passim*
Outlet Co. v. International Sec. Group, 693 S.W.2d 621 (Tex. App. 1985) 11, 12
Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) 2
Pennekamp v. Florida, 328 U.S. 331 (1946) 5
Peoples Bank and Trust Co. v. Globe Int'l Publishing, Inc., 978 F.2d 1065 (8th Cir. 1992) 13, 16
Rosenblatt v. Baer, 383 U.S. 75 (1966) 3, 6
Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) 8, 9
Speiser v. Randall, 357 U.S. 513 (1958) 5, 8
Time, Inc. v. Firestone, 424 U.S. 448 (1976) 10
Wheeler v. Green, 286 Or. 99, 593 P.2d 777 (1979) 14

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS — Page

U.S. Const. amend. I ..... *passim*
U.S. Const. amend. XIV 4, 18
Or. Const. art. VII, § 3 3

OTHER AUTHORITIES

Libel Defense Resource Center Bulletin, 1994 Issue No. 1 (January 31, 1994) 14
Sack & Tofel, *First Steps Down the Road Not Taken: Emerging Limitations on Libel Damages*, 90 DICK. L. REV. 609 (1986) 11, 15, 16
Van Alstyne, *First Amendment Limitations on Recovery From the Press*, 25 WM. & MARY L. REV. 793 (1984) 15

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STATEMENT OF INTEREST

Amici curiae are a cross-action of broadcasters, publishers, and associations representing the news media and journalists,[1] all of whom face the risk of irrational and unrestrained damage awards in the course of performing their vital task of keeping the public informed. Often, it is only the constitutional conscience of judges that stands between these members of the press and potentially crippling damage awards by juries determined to punish the messengers who carry the "vehement, caustic, and sometimes unpleasantly sharp attacks" [2] that often are at the core of public discourse.

Many of these *amici* have addressed the Court in recent cases examining the constitutionality of punitive damages.[3] In those instances, the Court was urged to recognize the particular threat to First Amendment freedoms posed by unrestrained punitive damages in defamation cases, a concern which members of the court have acknowledged.[4] The interest of *amici* in this case is similar, but even more direct. Here, *amici curiae* urge the Court to recognize and reaffirm the constitutional duty of courts at all levels to exercise independent review of any judgment arising from such cases, to assure that the award of damages is not used to punish or deter protected speech.

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[1] Written consent of both parties to the filing of this brief has been filed with the Clerk of the Court as required by Supreme Court Rule 37.

[2] *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

[3] *See, e.g.*, Briefs of Amici Curiae in *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993); *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988).

[4] *See Pacific Mutual*, 499 U.S. at 38-39 (Scalia, J., concurring); *The Florida Star v. B.J.F.*, 491 U.S. 524, 553 n.5 (1989) (White, J., dissenting, along with Justice O'Connor and the Chief Justice).

SUMMARY OF ARGUMENT

Amici curiae support the Petitioners' argument that judicial review of damages awards is necessary to assure due process of law in all cases and that Oregon Constitution Article VII, Section 3 as interpreted by the state supreme court prevents meaningful review at both the trial and appellate levels. More importantly, in libel actions and other cases implicating First Amendment freedoms, the Oregon rule would preclude courts from exercising their constitutional duty to independently assure "that the judgment does not constitute a forbidden intrusion on the field of free expression." [5]

The duty of independent review in First Amendment cases is a constitutional responsibility of all judges and cannot be delegated to the trier of fact.[6] In libel actions it is not confined to evidence of "actual malice" under the *New York Times* rule, but applies as well to any aspect of the case that may render the judgment impermissible under the First Amendment.[7]

The prospect of unrestrained damages awards in libel cases has long been recognized by the Court as an impermissible threat to First Amendment freedoms. Any award of damages "far in excess of any actual injury" constitutes an intrusion on the First Amendment that cannot be justified by the countervailing state interest in redressing actual injury.[8] It is a judgment that must be subject to independent judicial review.

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[5] *New York Times*, 376 U.S. at 285; *accord Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984).

[6] *Bose*, 466 U.S. at 501.

[7] *See, e.g., Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6, 13 (1970); *Rosenblatt v. Baer*, 383 U.S. 75 (1966), *New York Times*, 376 U.S. at 288.

[8] *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 329 (1974).

This Court has held that libel awards must be supported by evidence of actual injury.[9] But the experience of *amici curiae* has shown that judicial review of libel awards and sensitive application of such post-trial remedies as remittitur are essential to give meaning to this rule. Where "actual injury" may include such elusive and subjective claims as embarrassment, mental anguish, and damage to reputation, independent review of damages awards is constitutionally required to prevent these awards from becoming "a formidable weapon" for punishing unpopular speech and speakers.[10]

ARGUMENT

I. COURTS HAVE A CONSTITUTIONAL DUTY TO INDEPENDENTLY REVIEW JUDGMENTS THAT THREATEN FIRST AMENDMENT FREEDOMS.

The Petition before the Court challenges the Oregon courts' interpretation of their state constitution as preventing judicial review, at both trial and appellate levels, of the amount of damages awarded by juries. In effect, Oregon courts are denied the power of remittitur. The question presented is whether this interpretation results in a denial of due process, in violation of the Fourteenth Amendment. *Amici* support Petitioners' argument that it does. Regardless of the answer to this general question, however, *amici* urge the Court to recognize that the Oregon rule also prevents independent review of damages awards that punish or threaten free expression, and therefore is inconsistent with the First Amendment.

In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Court recognized a constitutional duty

> to review the evidence in the present record to determine whether it could constitutionally support a judgment for respondent. This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. . . . We must "make an independent examination of the whole record," so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.

Id. at 284-85 (quoting *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963)) (citation omitted).

Although this constitutional mandate of independent review is most often addressed to the threshold question of "actual malice" under the rule in *New York Times*,[11] the review cannot be confined to that single issue.[12] In *New York Times* itself, the Court extended its review to examine whether the allegedly libelous statements were made "of and concerning" the plaintiff:

> We also think the evidence was *constitutionally* defective in another respect: it was incapable of supporting the jury's finding that the allegedly libelous statements were made "of and concerning" respondent.

376 U.S. at 288 (emphasis added).

Similarly, in *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6 (1970), the Court independently reviewed evidence of the circumstances surrounding publication of a purported charge of blackmail, and held

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[9] *Gertz*, 418 U.S. at 349.

[10] *Gertz*, 418 U.S. at 367 (Brennan, J., dissenting).

[11] *See, e.g., Bose*, 466 U.S. 485.

[12] Indeed, the rule cited by the Court to compel independent review of the evidence in *New York Times* was drawn from a series of First Amendment cases that obviously predated announcement of the "actual malice" rule. *See New York Times*, 376 U.S. at 285: *Edwards v. South Carolina*, 372 U.S. 220, 235 (1963); *Speiser v. Randall*, 357 U.S. 513, 525 (1958); *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946).

"that as a matter of *constitutional* law, the word 'blackmail' in these circumstances was not slander when spoken, and not libel when reported in the *Greenbelt News Review*." Id. at 13 (emphasis added).

In *Rosenblatt v. Baer*, 383 U.S. 75 (1966), the Court held that evidence relating to the respondent's status as a public official was reviewable under the same constitutional standard of independent review:

> [I]t is for the trial judge in the first instance to determine whether the proofs show respondent to be a "public official." . . . Such a course will both lessen the possibility that a jury will use the cloak of a general verdict to punish unpopular ideas or speakers, and assure an appellate court the record and findings required for review of constitutional decisions.

Id. at 88 and n.15 (citing *Speiser v. Randall*, 357 U.S. 513, 525 (1958); *New York Times*, 376 U.S. at 285).

The lesson of these cases is clear. The constitutional responsibility of independent judicial review is not confined to reviewing a single threshold test such as actual malice. It extends to any aspect of a judgment that, if upheld, would "constitute a forbidden intrusion on the field of free expression," *New York Times*, 376 U.S. at 285, and therefore independent judicial review should encompass the issue of whether damages awarded to a libel plaintiff are permissible compensation for actual injury, or whether they cross the constitutional line to act as forbidden punishment of speech. The Oregon rule abrogates judicial responsibility for this critical determination and delegates to the jury the unreviewable discretion to award damages far in excess of actual injury. This result is unconstitutional in First Amendment cases:

> [T]he rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the factfinding function

> be performed in the particular case by a jury or by a trial judge.

Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 501 (1984).

II. THE AMOUNT OF DAMAGES AWARDED IN FIRST AMENDMENT CASES IS AN ISSUE OF CONSTITUTIONAL DIMENSION SUBJECT TO THE DUTY OF INDEPENDENT JUDICIAL REVIEW.

In refining constitutional limitations on the law of libel in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), this Court recognized that "the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment," *id.* at 325, required a balancing of First Amendment interests against "[t]he legitimate state interest underlying the law of libel [which] is the compensation of individuals for the harm inflicted on them by defamatory falsehood." *Id.* at 341. That state interest, the Court stressed, "extends no further than compensation for actual injury."[13] *Id.* at 349.

These central principles define the constitutional line between the legitimate state interest in providing compensation for actual injury and the impermissible award of excessive damages to punish unpopular speech and speakers:

> [T]he doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact. More to the point, *the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury.*

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[13] The Court even suggested that in the absence of such a state interest "this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation." *Gertz*, 418 U.S. at 341.

Id. (emphasis added). In other words, an award of damages "far in excess of any actual injury" constitutes an intrusion on the First Amendment that cannot be justified by a countervailing state interest. Under the cases discussed above, it is therefore the constitutional duty of the courts to independently review such damages awards and, where necessary, to redraw that line to restore the proper balance. *See New York Times,* 376 U.S. at 285; *Speiser v. Randall,* 357 U.S. 513, 525 (1958).

Independent review of libel damages awards is at least as critical as review of evidence of actual malice, falsity, identification of the plaintiff ("of and concerning"), or any other constitutional threshold question. In all the Court's efforts to define the constitutional limitations on the law of libel, the underlying theme has been the recognition that the threat of unrestrained damages awards creates an unconstitutional chill on the exercise of First Amendment freedoms. See *New York Times,* 376 U.S. at 277 ("fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute");[14] *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29, 83 (1971) (Marshall, J., dissenting) ("fear of the extensive awards that may be given under the doctrine must necessarily produce the impingement on freedom of the press recognized in *New York Times*");[15] *Gertz,* 418

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[14] The Court also stated in *New York Times*:

> A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable "self-censorship." . . . The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.

376 U.S. at 279.

[15] Justice Marshall further explained:

> The effect is to give the jury essentially unlimited discretion and thus to give it much the same power it exercises under

U.S. at 349 ("[t]he largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential . . . to inhibit the vigorous exercise of First Amendment freedoms"); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 472 U.S. 749, 772 (1985) (White, J., concurring) ("the *New York Times* standard was formulated to protect the press from the chilling danger of numerous large damages awards").

Justice White, writing separately in both *Gertz* and *Dun & Bradstreet,* expressed the opinion that controlling the amount of libel damages might be at least as effective a constitutional limitation as application of the *New York Times* rule. In his dissenting opinion in *Gertz,* he disagreed with the majority's approach and argued that protection against uncontrolled damages awards could be left to "the role of trial and appellate courts in limiting excessive jury verdicts where no reasonable relationship exists between the amount awarded and the injury sustained." 418 U.S. at 394. He supported this argument with an extensive footnote discussing the use of appellate review and remittitur as an effective means of exercising the necessary control. *Id.* at 394 n.31.

In *Dun & Bradstreet,* Justice White was more explicit:

> In *New York Times,* . . . we could have achieved our stated goal by limiting the recoverable damages to a level that would not unduly threaten the press. Punitive damages might have been scrutinized as

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> the labels of punitive or exemplary damages. The impingement upon free speech is the same no matter what label is attached.
>
> The unlimited discretion exercised by juries in awarding punitive and presumed damages compounds the problem of self-censorship that necessarily results from the awarding of huge judgments. This discretion allows juries to penalize heavily the unorthodox and the unpopular and exact little from others. Such free wheeling discretion presents obvious and basic threats to society's interest in freedom of the press.

Rosenbloom, 403 U.S. at 83-84 (Marshall, J., dissenting).

> Justice Harlan suggested in *Rosenbloom*, or perhaps even entirely forbidden. Presumed damages to reputation might have been prohibited, or limited as in *Gertz*. . . .
>
> . . . . The necessary breathing room for speakers can be ensured by limitations on recoverable damages; . . . .

472 U.S. at 771 (White, J., concurring) (citation omitted).

Although *amici* disagree with any suggestion that independent judicial review of damages awards could ever take the place of the constitutional protection afforded by the *New York Times* rule, Justice White's opinions emphasize that it is the threat of unrestrained *damages*, not just abstract theories of liability, that leads to self-censorship and causes would-be critics of official conduct "to make only statements which 'steer far wider of the unlawful zone.'" *New York Times*, 376 U.S. at 279 (quoting *Speiser v. Randall*, 357 U.S. at 526). To the extent such damages awards exceed compensation for actual injury, they represent exactly the kind of "forbidden intrusion on the field of free expression" that all courts have a constitutional duty to prevent. *New York Times*, 376 U.S. at 285; *Bose*, 466 U.S. at 501.

III. LOWER FEDERAL COURTS AND OTHER STATE COURTS HAVE RECOGNIZED THE NEED FOR INDEPENDENT REVIEW OF DAMAGES AWARDS IN LIBEL CASES.

This Court has not had occasion to directly apply independent review to the amount of, and evidentiary support for, libel damages awards,[16] but lower federal courts

[16] Petitioners did not raise the claim that the damages award was excessive in *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), and the Court found "no warrant for reexamining [the jury's] determination" of the amount of damages, *id.* at 461, after concluding sufficient "competent evidence [was] introduced to permit the jury to assess the amount of injury." *Id.* at 460. The Court accordingly reviewed the record as required under *Gertz*, 418 U.S. at 459-61, and thus the Court's citation to the 1894 case *City of Lincoln v. Power*, 151 U.S. 436 (1894), in this context was questionable. *See* Sack & Tofel, *First Steps Down the Road Not Taken: Emerging Limitations on Libel Damages*, 90 DICK. L. REV. 609, 618 (1986).

and state courts have applied the principles of *New York Times* and *Gertz* as requiring a searching review of such damages awards.

The Nevada Supreme Court relied on *Gertz* for its opinion that "in a public figure slander case against media defendants added scrutiny must be given to large compensatory damage awards because of their impact on free speech." *Nevada Indep. Broadcasting Corp. v. Allen*, 99 Nev. 404, 664 P.2d 337, 347 (1983). In that case, a gubernatorial candidate sued a broadcaster for defamation as a result of statements made by the moderator of a candidates' forum that was broadcast on the eve of the Republican primary election. The court affirmed the jury's determination of liability but not the jury's award of $675,000 in alleged compensation:

> We find the potential for inhibiting the vigorous exercise of First Amendment freedom in this case because the damage award far exceeds any conceivable damage that might have been done to Allen's political reputation or damages suffered as a result of an[y] humiliation or mental suffering brought about by the defamatory material presented in this case.

Id. As a result of its review of the record, the court held that "$50,000 is the maximum amount that could be reasonably awarded under the circumstances" and ordered a new trial unless the plaintiff agreed to remit all damages in excess of this amount. *Id.*

In *Outlet Co. v. International Sec. Group*, 693 S.W.2d 621 (Tex. App. 1985), the court similarly scrutinized

jury awards of compensatory and punitive damages in a suit arising out of a broadcaster's investigation into a multi-million dollar gun smuggling scheme. After ordering remittitur of one half of the compensatory damages award because insufficient evidence supported the full award, the court turned to punitive damages:

> [I]t is clear that the courts consider the punishment of error as running the risk of "inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press. . . . [which] may lead to intolerable self-censorship."
>
> Here, [plaintiff] has recovered his actual as well as his special damages. Consequently, little is left to be served by the award of punitive damages except to punish and to set an example for others—both inviting a cautious and restrictive exercise of free speech and press. This consideration, together with the circumstances which we have considered with respect to the actual damage award lead us to conclude that the punitive damage award is excessive. We will therefore order that one-half of the punitive damages awarded be remitted.

Id. at 629-30 (quoting *Gertz*, 418 U.S. at 340).[17]

Lower federal courts have reached the same conclusion. In *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123 (2d Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985), the court found insufficient evidence of actual malice and overturned a libel judgment in favor of the plaintiff. The court nevertheless addressed the issue of the amount of the damages award intended to "compensate" the plaintiff for her mental anguish and damaged reputation:

> The jury awarded plaintiff a total of seven million dollars in compensatory damages, which the trial court refused to reduce. No doubt such an enormous verdict chills media First Amendment rights. But a verdict of this size does more than chill an individual defendant's rights, it deep-freezes that particular media defendant permanently.

Id. at 141. After examining the evidence, the court concluded that neither the slight damage to plaintiff's reputation nor her "lacerated feelings are worth anything close to $7 million." *Id.*

The court in *Peoples Bank and Trust Co. v. Globe Int'l Publishing, Inc.*, 978 F.2d 1065 (8th Cir. 1992), agreed with the jury's finding of liability but disagreed with the district court's refusal to reduce the jury's award of $650,000 in compensatory damages for the plaintiff's damaged reputation. The court examined the record and concluded,

> This evidence, although sufficient to sustain an award, does not support the shockingly inflated award granted by the jury. Accordingly, we find an abuse of the district court's discretion in not granting a remittitur on compensatory damages, and remand for a substantial remittitur.

Id. at 1071.[18]

State and lower federal courts recognize, therefore, that independent judicial review of jury awards in libel cases—and the attendant power to order a remittitur to

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[17] *See also A.H. Belo Corp. v. Rayzor*, 644 S.W.2d 71, 86 (Tex. App. 1982) (the "Supreme Court has repeatedly recognized that the prospect of excessive damage awards, in wholly unpredictable amounts unrelated to the extent of actual harm caused, induces intolerable media self-censorship"); *Kidder v. Anderson*, 345 So.2d 922, 942-43 (La. App. 1977) (reducing amount of compensatory damages awarded by jury in libel suit "in light of the 'chilling effect' which the threat of potentially large defamation verdicts poses to the exercise of First Amendment rights"), *rev'd on other grounds*, 354 So.2d 1306 (La.), *cert. denied*, 439 U.S. 829 (1978).

[18] *But see id.* (finding, however, that "the district court did not abuse its discretion in declining to remit the award for punitive damages").

reduce that award to an amount justified by the evidence —is vital to the protection of First Amendment interests.[19]

IV. THE PROHIBITION OF PRESUMED AND PUNITIVE DAMAGES DOES NOT REMOVE THE NEED FOR INDEPENDENT JUDICIAL REVIEW OF LIBEL DAMAGES AWARDS.

In *Gertz*, this Court held that "the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." 418 U.S. at 349. Similarly, the Oregon Supreme Court in *Wheeler v. Green*, 286 Or. 99, 593 P.2d 777 (1979), ruled that the Oregon Constitution prohibits punitive damages in defamation cases: "In the sensitive area of free expression, however, the threat of large damage recoveries can easily inhibit the exercise of freedom of constitutionally protected expression, as well as its abuse." 593 P.2d at 789.[20]

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[19] The most recent report of the Libel Defense Resource Center (LDRC) on trial results, damages awards and appeals in libel cases emphasizes both the need and the efficacy of judicial intervention at the jury verdict stage. Of 34 libel awards reported from 1990 to 1993, LDRC reports that 41.2% were disturbed by the trial court on defendants' post-trial motions (including orders of JNOV, new trials, and remittitur) and 23.5% of all awards were subject to remittitur. Cases surveyed for the period 1980 to 1989 resulted in 28.5% disturbed on post-trial motions, including 16.5% on remittitur. At the appellate level, approximately 30% of libel awards were disturbed (including reduction of damages and reversal), including approximately 6% in which the amount of damages was reduced by the appellate courts. Comparable figures for the 1980 through 1989 period show 70% of all libel awards disturbed on appeal, including 17% (25 cases) in which the amount of damages was reduced. Libel Defense Resource Center Bulletin, 1994 Issue No. 1 (January 31, 1994).

[20] Significantly, the Oregon Supreme Court went on to note that "[t]his is likely to be particularly true in Oregon where the courts, having no power of remittitur, have little or no control over the amounts which juries award as punitive damages." *Id.*

It is deceptively easy to conclude that prohibition of these inherently unrestrained damages awards should be sufficient protection against the chilling effect of excessive jury verdicts.[21] Such arguments, however, ignore what has been characterized as "the part Alice-in-Wonderland, part Kafka nature" of libel judgments:

> Typically, compensatory damages are based on no more than subjective reports of psychic injury. A million dollars or more in this context is worse than arbitrary. A rule that permits a jury to pick that kind of a number out of thin air, without regard to actual, measurable injury mocks the word "compensation." It is not designed to result in fair and full redress. It is, instead, a license for the jury to vent its anger at the words spoken and whoever spoke them.

Sack & Tofel, *First Steps Down the Road Not Taken: Emerging Limitations on Libel Damages*, 90 DICK L. REV. 609, 612 (1986) (footnote omitted); *see* Van Alstyne, *First Amendment Limitations on Recovery From the Press*, 25 WM. & MARY L. REV. 793, 795-96 (1984) ("juries may tend to find whatever they are told is necessary for them to find if they thoroughly dislike the publisher, his publication, his general practice, or his business").

Justice Brennan, addressing the Court's attempt to limit recovery to "actual injury" in *Gertz*, observed:

> [T]he Court's broad-ranging examples of "actual injury," including impairment of reputation and standing in the community, as well as personal humilia-

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[21] Indeed, Justice White argued as much in *Gertz*:

> [I]f the Court's principal concern is to protect the communications industry from large libel judgments, it would appear that its new requirements with respect to general and punitive damages would be ample protection.

418 U.S. at 391 (White, J., dissenting).

> tion, and mental anguish and suffering, inevitably allow a jury bent on punishing expression of unpopular views a formidable weapon for doing so. Finally, even a limitation of a recovery to "actual injury"—however much it reduces the size or frequency of recoveries—will not provide the necessary elbowroom for First Amendment expression.

418 U.S. at 367 (Brennan, J., dissenting.)

Certainly, a prohibition against *any* award of punitive damages may prevent the least restrained and openly punitive element of libel awards. It does not, however, prevent the jury from venting its anger in the form of inflated general or "compensatory" damages. The uncomfortable fact, as suggested by Messrs. Sack and Tofel, *supra*, is that juries can and do use the highly subjective weapon of libel damages to punish unpopular speech and speakers.[22] Even when there appears to be an attempt to rationalize and articulate the basis for awards, the result is often bizarre.[23]

Regardless of the care with which this Court and others articulate standards of fault, burdens of proof, quanta of evidence, and other constitutinal limitations on libel judgments, it is ultimately the unrestrained award of money damages that threatens the "uninhibited, robust, and wide-

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[22] *See, e.g., Peoples Bank and Trust*, 978 F.2d at 1070-71 (total jury award of $1.5 million against tabloid publisher); *Lerman*, 745 F.2d at 141 (jury award $7 million in compensatory and $33 million in punitive damages against publisher of adult magazine).

[23] *See* Sack & Tofel, *First Steps, supra*, at 613-15 (discussing *McCoy v. Hearst Corp.*, 174 Cal. App. 3d 892, 220 Cal. Rptr. 848 (1985), *rev'd*, 42 Cal. 3d 835, 231 Cal. Rptr. 518, 727 P.2d 711 (1986), *cert. denied*, 481 U.S. 1041 (1987), in which the court of appeal summarily upheld a million dollar damages award in exactly the same amount for each of three plaintiffs and assessed those awards almost equally among the three defendants without regard to the absence of measurable harm, the individual injuries alleged by each plaintiff, or the varying degrees of culpability of each defendant).

open" coverage of public issues. That is the point at which the need for constitutional protection is often most compelling. Yet it is precisely at that point that the Oregon courts would deny their authority to act.

The Oregon Supreme Court in the case before this Court has interpreted the state constitution to permit judicial review of damages awards in only two areas: (1) "[i]f there is *no* evidence to support the jury's decision . . . then the trial court or the appellate courts can intervene to *vacate* the award," 851 P.2d at 1096 (emphasis added); and (2) "to test the sufficiency of the jury instructions," *id.* at 1097. Neither limited form of review allows the courts to ensure that First Amendment concerns are addressed.

The power to vacate an award that is unsupported by any evidence is important, but it simply does not address the situation in which sufficient evidence exists to support a damages award but that evidence does not support the *amount* of damages awarded by the jury. In the *Nevada Independent Broadcasting* case discussed above for example, the jury awarded $675,000 in "compensatory" damages, but the court found on review of the record that the maximum amount a reasonable jury would have awarded was $50,000. 664 P.2d at 347. Because *some* evidence existed to support a damages award, Oregon courts in identical circumstances would be compelled to uphold the jury's entire verdict, even though it is over 13 times more than the maximum amount a reasonable jury would have awarded.

Sufficiency of jury instructions similarly does not ensure that a jury will not be swayed by passion or prejudice to inflate a "compensatory" or punitive damages award. Again, the Nevada Supreme Court in *Nevada Independent Broadcasting* "carefully examined the instructions claimed by appellants to be erroneous and [f]ound no prejudicial error." *Id.* at 345. Yet, that same court concluded that

the jury's award was "not supported by the evidence and therefore must have been given under the influence of passion or prejudice." *Id.* at 347. The inability to remedy such blatant error can only result in the severe chill to the free exercise of First Amendment freedoms that has historically been the central concern of this Court.

CONCLUSION

This Court has long recognized that independent judicial review in First Amendment cases is a constitutional duty of all courts that cannot be delegated to the trier of fact. That constitutional duty must include review of damages awarded in libel and related cases, to prevent such awards from being used to punish and deter protected speech. The Oregon rule that prevents effective judicial review of damages awards is inconsistent with the First and Fourteenth Amendments and should be struck down.

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APPENDIX

APPENDIX

IDENTITY OF INDIVIDUAL *AMICI*

CBS Inc. is the owner of television and radio broadcasting stations and the operator of national television and radio networks engaged in the dissemination of news and public affairs programming.

Cable News Network, Inc. creates, produces and distributes several television programming services nationally and worldwide, including Cable News Network ("CNN") and CNN International ("CNNI").

Capital Cities/ABC, Inc. through its subsidiaries, owns national radio and television networks, television and radio stations, daily and weekly newspapers, and other publications, all of which are engaged in the gathering and dissemination of news to the public.

The Copley Press, Inc. publishes ten daily newspapers in California and Illinois, whose combined circulation is approximately 750,000.

The Chronicle Publishing Company publishes the *San Francisco Chronicle* with a daily circulation of 565,000 and a Sunday circulation of 730,000. Chronicle Broadcasting Co., a division of The Chronicle Publishing Company, operates three television stations, and Western Communications, another division, operates cable television systems serving approximately 330,000 subscribers in three states.

Dow Jones & Company, Inc. publishes, inter alia, *The Wall Street Journal*, the largest circulation daily newspaper in the country, as well as *Barron's National Business and Financial Weekly, Dow Jones News Services* and through its Ottaway Newspapers, Inc. subsidiary, newspapers in 29 communities in 13 states.

Providence Journal Company owns and operates nine broadcast television stations; through its subsidiaries Colony Communications, Inc. and King Videocable Company operates cable television systems serving approximately 770,000 subscribers in nine states; and publishes newspapers in Providence, R.I. collectively known as The Journal-Bulletin.

Reuters America, Inc. is the primary North American operating company of Reuters Holdings PLC, the international news and financial information organization. Reuters supplies information to both business subscribers and to the news media. It obtains its information from approximately 160 exchanges and over-the-counter markets, from data contributed directly by more than 3,715 subscribers in 82 countries and from a network of some 1,270 journalists and photographers.

Time Inc. is the largest publisher of general circulation magazines in the United States. Among the magazines it publishes are TIME, FORTUNE, SPORTS ILLUSTRATED, PEOPLE, MONEY, LIFE, and ENTERTAINMENT WEEKLY.

Westinghouse Broadcasting Company, Inc., through its subsidiaries, owns television and radio stations in major markets and produces and distributes programming for broadcast and cable television.

The Association of American Publishers, Inc. is the major national association in the United States of publishers of general books, text books and educational materials. Its more than 200 members include most of the major commercial book publishers in the United States and many smaller or nonprofit publishers including university presses and scholarly associations.

The National Association of Broadcasters ("NAB"), organized in 1922, is a nonprofit incorporated trade association that serves and represents radio and television stations and networks. NAB's members cover, produce and

broadcast the news to the American people. NAB seeks to preserve and enhance its members' ability to freely disseminate information concerning the activities of government and other matters of public interest and concern.

The Newspaper Association of America ("NAA") is a nonprofit corporation serving approximately 1,250 newspapers in the United States and Canada. The majority of these are daily newspapers that account for more than 90 percent of the newspaper circulation of the United States. NAA membership also includes a substantial number of non-daily U.S. newspapers.

Radio-Television News Directors Association is the principal professional association of electronic journalists in the United States. The Association's members gather, edit and disseminate news and other public affairs information carried by the national broadcast and cable networks, local radio and television broadcast stations, and cable television systems.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of working reporters and editors dedicated to defending the First Amendment and freedom-of-information interests of the news media and public. The Reporters Committee has provided representation, legal guidance and research in virtually every major press freedoms case litigated since 1970.

The Society of Professional Journalists is a voluntary, nonprofit organization of 14,000 members. The Society is the largest and oldest organization of journalists in the United States, representing every branch and rank of print and broadcast journalism.